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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1965

No.

MARTIN A. JORDAN and VIOLET E. JORDAN, his wife, and JAMES F. McMICKEN and DOROTHY McMICKEN, his wife,

Appellants,

vs.

VILLAGE OF MENOMONEE FALLS,

Appellee.

MOTION TO DISMISS APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

Appellee moves the Court to dismiss the appeal herein on the following ground:

No substantial federal question is presented by the appeal.

BRIEF IN SUPPORT OF MOTION

I. SUPPLEMENTAL STATEMENT OF THE CASE

It seems advisable to state a few additional facts to refute erroneous impressions left by Appellants' statement of the case, particularly with respect to the motive of the Village Board in drafting the ordinance and the use of Appellants' funds and benefits received therefrom.

The materiality of the motives of any legislative body in the passage of an act are doubtful, but if such are of any evidentiary value it is unfair to take excerpts from minutes prepared in narrative form by a clerk of what transpired at the public hearings before the passage of the ordinance in question. The minutes make no pretext of being verbatim accounts of what was actually said, or all of the reasons for the proposed action. By its own terms the ordinance was adopted to provide adequate open spaces and sites for public use in proper locations. The Wisconsin legislature in authorizing the Village to pass the ordinance in question set forth numerous other purposes to be accomplished by the legislation. (Wis. Stats. 1959, 236.45(1)). These included the orderly use of land, provision for adequate light and air, the prevention of overcrowding, and the facilitation of adequate provisions for parks and schools. To accomplish these purposes the Board was directed to make regulations with reasonable consideration for the conservation of the value of buildings in the Village and to provide the best possible environment for human habitation.

It is thus obvious that the Board intended to accomplish these purposes and was not guided solely by a de-

sire to raise money in addition to taxes. In providing for light and air and open spaces and to reduce the burden of public facilities caused by the subdivision of land, the Board might well have required home sites of an acre or more. Instead of that the lots were only required to be about one-third of an acre in size including the streets; and as the required lot size decreases, the need for open spaces, parks and recreational facilities obviously must increase.

Appellants infer that they received no value for the equalization fees because the fees were not used in the subdivision from which collected. Actually the new Shady Lane School was established a half mile from the subdivision (Map, Pl's. Ex. 8, R. 225) shortly before Appellants' purchase of the land. Its construction started in February 1960 (R. 117) shortly after the purchase and an addition of thirteen rooms was completed in September 1962 (R. 117) during the time Appellants were selling their lots. Part of the land for this school was dedicated by the developers for an adjoining subdivision (Platting Fee Fund, Pl's. Ex. 7, R. 217). Four other subdividers dedicated parts of their property along the Menomonee River one to two miles from Appellants' subdivision shortly prior to the development of it (R. 123; Platting Fee Fund, Pl's. Ex. 7, 217, 218; Map, Pl's. Ex. 8, R. 225). Thus Appellants obtained all the advantages of park lands and a school in close proximity to the subdivision, a fact which, as they admit, was of interest to them as developers of residential lots (R. 121).

Appellants' subdivision was only 7.85 acres in size. Because of the small dimensions it never occurred to them to dedicate or offer to dedicate any land for parks and schools (R. 121). The Village Board set the value of the land to be dedicated or the cash to be paid in lieu

thereof at $200.00 per lot after consideration of the experience and advice of expert municipal planners of the amount of land required by the ordinary family in addition to the homesite, and the probable cost of land in the Village (R. 114). The figure represents a reasonable minimum cost of the land required for parks and schools per family (R. 115). It is a figure below the actual cost (R. 116). Parks and schools enhance the value of undeveloped as well as platted property, and help preserve land values in a community (R. 116). There is no contention by Appellants that the amount paid per lot is unreasonable with reference to the value of the property (R. 113).

II. THE APPROPRIATE EXERCISE OF THE POLICE POWER IS CONSISTENT WITH ALL PROVISIONS OF THE FOURTEENTH AMENDMENT

A. Proper Exercise of the Police Power Is Not a Taking or Deprivation of Property Without Due Process of Law.

Whether compliance with reasonable subdivision regulations be regarded as voluntary in order to obtain the benefits of the right to subdivide, (See *Ross v. U.S. ex rel. Goodfellow* (1895) 7 App. D.C. 1; *Ridgefield v. Detroit* (1928) 241 Mich. 468, 217 N.W. 58; *Newton v. American Sec. Co.* (1941) 201 Ark. 943; 148 S.W. (2d) 311; *Billings Properties, Inc. v. Yellowstone County* (1964) 144 Mont. 25; 394 P. 2d 182) or whether such regulation be regarded the exercise of the police power by the state for the common good and general welfare,

the rules permit reasonable regulation and produce similar results.

> "The police power, which it has been said, is not a rule but an evolution, is perhaps the most important of governmental powers. It has been called a principal pillar of government and has been described as the most essential, at times the most insistent, and always one of the least limitable of the powers of government. Moreover it has been said that the very existence of government, as well as the security of the social order, the life and health of the citizen, the enjoyment of private and social life, and the beneficial use of property are dependent upon this power." (16 *Am. Jur.* 2d 517, Constitutional Law, Section 263).

The Fourteenth Amendment is a limitation upon the improper exercise of police power by states in that it prevents an arbitrary or unreasonable exericse of the power through law or regulation; but regulation under a proper exercise of that power is due process, even though property in whole or in part is taken or destroyed, or burdens or expenses of various types are imposed. Due process is not to be construed so as to put the state and federal governments into a straight jacket, and prevent them from adapting life to the continuous change in social and economic conditions (16 *Am. Jur.* 2d 580, Constitutional Law, Section 296). Regulations are sustained under the complex conditions of today which but a short time ago might have been condemned as arbitrary and unreasonable (*Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365 at 387). In view of changing conditions any attempt to trace the outer limits of the police power is fruitless. Its definition is essentially a product of legislative determinations addressed to the purposes of government.

"Subject to constitutional limitations, when the legislature has spoken the public interest has been declared in terms well nigh conclusive. In such cases the legislature not the judiciary is the main guardian of the public needs to be served by social legislation whether it be Congress legislating concerning the District of Columbia, (See *Block v. Hirsh,* 256 U.S. 135) or the States legislating concerning local affairs." (*Berman v. Parker* (1954) 348 U.S. 26 at 32).

"Too much significance cannot be given to the word 'reasonable' in considering the scope of the police power in a constitutional sense, for the test used to determine the constitutionality of the means employed by the legislature is to inquire whether the restrictions it imposes on rights secured to individuals by the Bill of Rights are unreasonable, and not whether it imposes any restrictions on such rights. The validity of a police regulation therefore primarily depends on whether under all the existing circumstances the regulation is reasonable or arbitrary and whether it is really designed to accomplish a purpose properly falling within the scope of the police power." (16 Am. Jur. (2d) 538, Constitutional Law, Section 277).

The legislation must be reasonable in the sense that it must be based on reason as distinct from being wholly arbitrary or capricious. (Ibid., Section 278, Page 539) Questions of reasonableness are, by their nature, concerned with matters of degree.

"The discretion of the legislature is very large in the exercise of the police power, both in determining what the interests of the public require and what measures and means are reasonably necessary for the protection of such interest." (Ibid. Section 281, Page 544).

The constitutionality of numerous zoning laws and subdivision requirements of states and municipalities have

been sustained so often there can be no doubt of the right under that power to impose reasonable restrictions on the use and division of land. Subdividers can be required to dedicate the land for streets, parks; (See *Lake Secor Development Co., Inc. v. Ruge,* 141 Misc. 913; 252 N.Y.S. 809; *Billings Properties, Inc. v. Yellowstone County* (1964) 144 Mont. 25, 394 P. (2d) 182) and to provide various public improvements required for the future inhabitants of the subdivision. With respect to sewers and drainage they have been required in several cases to pay reasonable amounts for the construction of such improvements off their premises as well as on, and even though others get some benefit or use from the improvement. (See *Buena Park v. Boyer* (1960) 8 Cal. Rep. 674; 186 C.A. (2d) 61. *Longridge Estates v. Los Angeles* (1960) 6 Cal. Rep. 900. *Stanco v. Suozzi* (1958) 171 N.Y.S. (2d) 997). The size of the lots can be specified to insure proper light and air and to prevent overcrowding and to make for the best possible conditions of human habitation and to maintain the values of property and buildings.

The law is so well established that any attack upon constitutionality must hinge on the question of reasonableness, taking into consideration the conditions and problems shown to exist. In this case, the Village in exercising its power to prescribe the amount of open spaces and light and air, and to prevent the overcrowding of land and the public facilities might well have required lots of much larger size. An acre or more for each would not have been unreasonable nor excessive. In the present case any such requirement would have reduced the number of lots in Appellants' subdivision from twenty-five (25) to seven (7) and greatly increased the cost of street, sewer and water per lot. Instead, the Vil-

lage chose to permit the smaller lots, but, to make up for the loss of open spaces and light and air, and the crowding of land, it required the dedication of a specified and limited amount of land for public purposes. If such was not feasible or the subdivider did not desire so to do, the Village, in lieu thereof, required the payment of cash to the extent of the value of the specified amount of land so that it could obtain the open spaces elsewhere. In the present case this was accomplished in part through obtaining some of the land for the new school and several parcels for parks through dedication of land in neighboring subdivisions. The new school was located a half mile and the parks approximately a mile and a half from Appellants' subdivision. Instead of being required to furnish the open space in their subdivision, Appellants have retained and had the benefit of their entire tract. They have been able to dispose of it at a gain of twenty-five thousand dollars ($25,000.00) after paying for all improvements and the equalization fee required of them, thus profiting to the extent of approximately One thousand Dollars ($1,000.00) per lot. All lots were sold within a year and a half, assisted no doubt by the proximity of schools and parks and the planned development of the community. Instead of diminishing the value of Appellants' property, the ordinance, at least in good measure, increased it. Thus one criterion influencing the opinion of this Court that the state law involved in *Pennsylvania Coal Company v. Mahon* (1922) 260 U.S. 393, constituted an unreasonable exercise of the police power, that is, its depressing effect on the value of the property concerned, is wholly absent in the present case.

Appellants admit the reasonableness of the amount of space or fee required, and appear to admit, at least do not contest, the general welfare and public purposes to be ac-

complished by the enactment of the ordinance. Their attack upon the ordinance appears to be centered on the claim that the use of the money is not limited primarily to the residents of the subdivision. Under the ordinance the money had to be used and was in fact used for the capital improvement of schools and parks (R. 118; 122), but in this case it had to be used outside of Appellants' subdivision because all of it was divided into homesites with the exception of streets. With land in the vicinity having been dedicated for school and park purposes, the school portion of the equalization fee paid by Appellants necessarily went to reimburse the School District in small measure for the Shady Lane School it had built for the benefit of several subdivisions including the Appellants', and the rest of it went to pay the school portion of the fee for those subdivisions which dedicated land for parks. The money transferred to the School District was used to purchase another school site (R 118). Even if such was in another part of the Village it would benefit the subdivision in question by providing an alternate facility if disaster befell the Shady Lane School and by preventing the overcrowding of that school through development of other subdivisions elsewhere in the Village. An adequate school system is necessary to the maintenance of residential values in the subdivision as well as the community. The Village is so small that any improvement will be within 5½ miles of the subdivision (Map, Pl's. Ex. 8, R. 225). With today's mobility this constitutes no deterrent to its use by the residents of Appellants' subdivision.

B. Subdividers Are Properly Classified as a Separate Group Without Violating the Equal Protection Clause of the Fourteenth Amendment.

The Appellants also complain of denial of the equal protection of the law required by the Fourteenth Amendment to the Constitution citing claims of inequality which are unfounded. It is true the ordinance affected only new subdivisions, and is not retroactive. To require otherwise would be to take property without due process of law in violation of the very amendment under which they claim protection. They complain that the ordinance requires dedications only from subdividers of residential lots and not from business, shopping and industrial facilities. They overlook that it is the employees, not the businesses who use the parks or schools. They speak of discrimination against the newcomer in favor of the older residents, but fail to point out the detriment to and discrimination against the older residents in having their schools and parks overcrowded and depreciated by a hoard of newcomers. They suggest inequality because no payments are required of multiple housing units established without subdivision of land, but no evidence appears to establish that as materially affecting the situation. Much the greater number of newcomers are in search of, and much the greater part, if not all of the Village, is zoned for single family residence. Appellants complain as though they were being required to pay the entire expense of the facility forgetting the part already contributed by the older residents and that the value of the land to be dedicated, and consequently the size of the equalization fee set in the ordinance, was based upon the requirements of each family for land in addition to homesite based upon national experience. The new residents are paying only

a fraction of the expense incident to furnishing the improvements they require (R. 117).

In any event, the equality provisions of the Fourteenth Amendment do not require that every law must affect every person equally. Reasonable classifications can be established, and it is only necessary that the laws apply equally to the persons within such classification. In the absence of any evidence to the contrary, the legislative determination of the propriety of the classification controls.

> "Therefore, unless a classification is arbitrary and not founded on any substantial distinction or apparent natural reason which suggests the necessity or propriety of different legislation, a court has no right to interfere with the exercise of legislative discretion." (16 *Am. Jur.* 2d, 864; Constitutional Law, Section 496)

Since the law dealt only with the division of land, it could not deal with rental or multiple housing problems. Among subdividers, no greater equality of treatment can be imagined. By requiring dedication in terms of the value of land or equalization fee at subdivider's election, all questions of political favor or favoritism are avoided, and all differences among parcels of land reduced to one common denominator, i.e., its fair market value.

III. WHERE EACH CASE MUST BE DECIDED ON ITS OWN FACTS, DECISIONS IN OTHER CASES ARE OF LITTLE VALUE

With the thousands of cases of this and other courts defining the extent of the police power, it is apparent that this case involves no new or novel principle of law. The only problem is to apply the law to the facts, and

its proper application depends not only on what is attempted, but also on the conditions of the times, and the changes in the social order. In such situations, other decisions are of little help, and of little value as precedent. Extended discussion of the cases cited by Appellants is of little value. The decision in *Pioneer Trust & Savings Bank vs. Mount Prospect,* 22 Ill. (2d) 375, 176 N.E. (2d) 799, seems influenced by the court's apprehension or fear that the subdividers were being compelled to pay the entire cost of the school and park facilities. In *Gulest Associates, Inc. v. Town of Newburgh,* 25 Misc. (2d) 1004, 209 N.Y.S. (2d) 729, aff'd 15 App. Div. (2d) 815, 225 N.Y.S. (2d) 538, the decision was based on the thought that the money could be spent on recreational programs, and its value dissipated before the completion and settlement of the subdivision. The affirmance on appeal was specifically limited to the application of the ordinance to the case in question. *Jenad, Inc. v. Village of Scarsdale,* 23 App. Div. (2d) 784, 258 N.Y.S. (2d) 777 followed the *Gulest* case, though with an interesting and well reasoned dissent. The majority of the court in *Denver vs. Denver Buick, Inc.,* 141 Col. 121, 347 P. (2d) 919 regarded the ordinance as highly discriminatory in its application. The decision was arrived at only after several vigorous dissents and some thirty-five (35) pages of opinions as published in the Pacific Reporter.

Required reservations of land for future use, which may never take place and which prevent use of the property in the meantime without risk of loss, are easily distinguishable from the present situation; so also are the cases cited in Appellants' Jurisdictional Statement, footnote 8, Page 13, where the ordinances were found to exceed the authority delegated to the municipality by the state, and so are based on a local rather than a Federal question.

IV. THIS CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

This case involves only the application of well settled principles to the particular facts of this case. No interpretation of statute, either federal or state, is involved. That there are variations between states in the interpretation of the Federal Constitution is not surprising. That situation is no more unusual or important than variations in other matters of law, so long as the interpretation in question permits no violation of rights guaranteed by the Federal Constitution.

Because this case involves no new principle, an opinion after full argument and deliberation appears likely to add little to the numerous existing decisions dealing with every aspect of the police power.

Since every case must depend upon its peculiar facts a dismissal of the present appeal will not open the door to the legislation feared by Appellants. What is eminently reasonable for the small Village of Menomonee Falls is no precedent for what is reasonable in Chicago, Milwaukee or in cities much smaller in size. The test is and will remain the reasonableness of the exercise of the police power.

If the required dedication of land for streets is reasonable, then it is reasonable to require dedication of land for parks and schools, both of which are public improvements absolutely necessary for present day urban living. If dedication can be required for parks and schools, it is only reasonable to permit the substitution of money for the lands at the election of the subdivider. Not only is the burden thereby equally spread among subdivisions of varying size, but a large number of relatively small parcels are assembled into one piece of real

use and benefit to the several subdivisions as well as community. The best possible use of land is promoted, and the continued value of and usefulness of the property for residential purposes is assured.

We live in a dynamic and growing society. Our population increases by leaps and bounds. Change, accelerated by the development of all means of communication, occurs over night. Time for adjustment has been materially shortened, and as man lives closer and closer to man, more and more regulation becomes necessary for the benefit of all. What may be an unreasonable or arbitrary governmental interference in one period has often been accepted in later years as both necessary and constitutional when applied reasonably and equally to all people or property within a certain uniform class. The Appellants have benefited from the demand of a rapidly changing society, encouraged in part by their activity of subdivision development, and have no cause to complain if the welfare of that society now imposes some duty in return for the increased value it alone gives to their property.

Appellants have failed to sustain the burden cast upon them of showing an unreasonable, capricious or arbitrary exercise of the police power, or that such power was unreasonably, capriciously or arbitrarily applied to them.

In the absence of such evidence, the case presents no substantial federal question, and the appeal should be dismissed.

Respectfully submitted,

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